that its refusal to deal reasonably with an unaffiliated MVPD is based on economic considerations unrelated to its relationship with an affiliated cable operator.

This burden-shifting approach is consistent with the general purpose of the statute to promote competitive services -- if a MVPD can show an anti-competitive effect, the statute is triggered. In addition, this approach is consistent with the Congressional findings that vertically integrated programmers are unduly and improperly influenced by their cable MSO affiliates.[25] Quite simply, there may be no other way for an aggrieved MVPD to establish a claim under this section. If the statute is not to be interpreted as incapable of effectuation -- clearly, an untenable result -- the only reasonable approach is to place the burden on the affiliated cable operator or programmer to show why behavior that has an exclusionary effect, such as a programmer's refusal to deal with a qualified, unaffiliated MVPD, does not violate the statute.

2. *Non-Discrimination Under Section 628(c)(2)(B).*

Under new Section 628(c)(2)(B), the Commission is required to adopt regulations that prohibit discrimination by a vertically integrated satellite cable programming vendor in the prices, terms and conditions of sale of satellite cable programming among or between cable systems, cable operators, or other MVPDs. The statute also specifies four narrow, carefully drawn categories of behavior which are not to be prohibited as discriminatory under this section. These four exemptions constitute behavior that Congress found may be justified, and therefore not actionable under the statute. Thus, the structure of this section establishes clear parameters for the terms and conditions of satellite cable programming carriage agreements. Discriminatory terms are per se violations of the statute unless one of the enumerated defenses (i.e., one of the exemptions specified in Sections 628(c)(2)(B)(i)-(iv)) can be established by the vertically integrated programmer. The Commission should not attempt to broaden the exemptions lest they

[25] See notes 2 and 7-8, supra.

"swallow" the rule; the Congressional policy is solidly against discriminatory terms, and this should be the Commission's guiding principle in implementing this section.

The Commission requests comment on the standard it should adopt to evaluate claims of prohibited discrimination under this section, and suggests four possible regulatory models. NPRM at ¶¶ 19-25. While obviously there is no perfect model, DirecTv believes that none of the models proposed by the Commission is appropriate in the context of this statute, and that the correct model is contained in the statute itself: terms are discriminatory and therefore unlawful if they treat one MVPD differently from another, unless they are justified under one of the four statutory exemptions. DirecTV examines each of the Commission's proposed models against this statutory prescription.

While the reasonableness standard proposed as "Option 1" has a surface appeal, it ignores congressional policy that any price differential (or other difference in contract terms) is presumptively unlawful. The Commission has proposed establishing a "reasonable price differential" within which discriminatory pricing would be presumptively acceptable. NPRM at ¶20. The creation of such a "safe harbor" is directly contrary to the specific test for acceptable price differences set forth in Section 628(c)(2)(B)(ii). In that provision, Congress provided the Commission with detailed guidance on the factors which can justify a price difference; it would render that provision meaningless if the Commission created a "safe harbor" for discriminatory pricing which would not have to be justified under Section 628(c)(2)(B)(ii). Moreover, nowhere does the legislative history of the Act indicate that Congress ever endorsed or even considered an exemption for discriminatory price differences of a certain magnitude. Therefore, a "reasonableness" standard, without reference to the parameters adopted by Congress in 628(c)(2)(B)(ii), would result in arbitrary and ineffective enforcement of the statute.

"Option 3" (the standard under current antitrust laws) would void the statute of any meaning. While antitrust structural principles were relevant to and formed the foundation of the statute, it is also clear that Congress expanded upon strict antitrust doctrine.[26] Under Section 628(c)(2)(B), discriminatory terms are presumed unlawful unless they are justified under one of the four exemptions set forth in the statute. In contrast, under the Robinson-Patman Act, price discrimination is prohibited only where its effect may "substantially lessen competition." NPRM at ¶ 22. Section 628(c)(2)(B) simply does not require such a showing. Option 3, therefore, must be rejected.

The Commission's proposed "Option 4" also is flawed. An anti-dumping-type analysis appears inappropriate for a number of reasons. First, it is normally applied where prices are artificially lowered for competitive advantage, but in the cable industry, alternative MVPDs are victims of artificially high prices that programmers are able to demand because of vertical and horizontal concentration in the industry. Second, an anti-dumping analysis is extremely cumbersome to apply, typically involving calculations concerning global and national markets and valuations of barriers to trade. These calculations would be difficult and time-consuming for the Commission to make, would require burdensome evidentiary submissions by cable operators and programmers, and would encompass concepts not relevant to the issues involved here. Such calculations are inappropriate in a proceeding under Section 628(c)(2)(B), which requires the Commission simply to determine whether a difference in price, terms or conditions exists, and if so whether such difference is justified under any of the four exemptions enumerated in the statute.

"Option 2" is the test applied under Section 202(a) of the Communications Act to evaluate differences in the prices, terms and conditions for "like" communications services of

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[26] As noted above, Congress intended to put an end to refusals to deal, discriminatory pricing, and other practices which hinder cable's competitors from providing cable programming. See note 16, supra, and accompanying text. See also House Report at 42 (Congress determined that, in view of the important goal of programming diversity, "traditional antitrust analysis has not been, and should not be, the sole measure of concentration in media industries").

common carriers.[27] Under this two-part test, a programming contract with one MVPD containing different prices or other terms or conditions from those afforded another MVPD would constitute discrimination under Section 628(c)(2)(B) if the two contracts were for "like services." The discriminatory term then would be unlawful unless it could be justified by differences in the costs of providing the service to the two different MVPDs. NPRM at ¶ 21. While this test most closely approximates the analysis that Congress intended, it adds an unnecessary layer of complexity to a Section 628(c)(2)(B) analysis, because it requires the Commission to determine whether the services offered by a programmer to different MVPDs are "like" services. In effect, Congress has determined that, for purposes of enforcing Section 628's anti-discrimination prohibition, all cable programming services are "like" services. The Commission should not allow swift enforcement of this statute to be postponed by a complex analysis of the "functional equivalency" of different programming offerings.[28] In doing so, the Commission would merely invite programmers to repackage their services to lend the appearance of dissimilarity. This is not what Congress intended. Congress prohibited discrimination in the sale or delivery of cable programming to different MVPDs by vertically integrated programmers. There is no ambiguity concerning the services that are covered; the Commission simply has no

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27/ See 47 U.S.C. § 202(a).

28/ The Commission attempted to evaluate discrimination in the provision of broadcast programming to home satellite dish ("HSD") distributors using a Section 202 analysis. Under the compulsory copyright license granted in the Copyright Act, a satellite carrier may not "unlawfully discriminate" against a HSD distributor of superstation and network programming. 17 U.S.C. §119(a)(6). The Commission applied a Section 202(a) two-part analysis to review complaints that satellite carriers were unlawfully discriminating between HSD distributors and cable system operators in the price of superstation and network programming. First, the Commission considered whether the services provided to HSD distributors are "like" services provided to cable system operators, based on their "functional equivalency" to the customer. The Commission failed to reach a finding on this issue. The second part of the analysis consisted of a determination that satellite carriers charge higher prices to HSD distributors than to cable operators, and a consideration of the whether the disparities were justified by the cost of providing the services. See Inquiry Into the Existence of Discrimination in the Provision of Superstation and Network Station Programming, 5 FCC Rcd. 523 (Report) (1989); 6 FCC Rcd. 3312 (Second Report) (1991).

reason to open a common carrier-type inquiry into the equivalency of services which are the subject of a complaint under this section.

The second part of the proposed analysis under "Option 2", a cost-based analysis of price differentials, is consistent with the defenses allowed by Congress for price discrimination: Section 628(c)(2)(B)(ii) allows programmers to establish different prices, terms and conditions for their programming "to take into account actual and reasonable differences in the cost of creation, sale, delivery, or transmission" of the programming. Section 628(c)(2)(B)(iii) allows programmers to establish different prices, terms and conditions "which take into account economies of scale, cost savings, or other direct and legitimate economic benefits reasonably attributable to the number of subscribers served by the distributor." These statutory exemptions focus on the direct costs of the programmer associated with providing the service to different MVPDs, a burden the programmer must meet once different prices are shown. The Commission should bear in mind, however, that other narrowly defined, objective factors, such as volume discounts based on the number of subscribers served by the MVPDs, also are permissible justifications under the statute.[29] The Commission's "Option 2" model therefore falls short under the plain meaning of the statute.

Thus, to establish a prima facie claim under Section 628(c)(2)(B), it is sufficient to allege a difference in price, terms or conditions for the provision of a programming service; the programmer is then required to provide accounting support to justify the different treatment

[29] DirecTv recognizes that, under the plain meaning of the statute, there are legitimate bases for differentiating between the terms offered to different MVPDs based on factors other than costs. Under subsection (B)(i), programmers may impose "reasonable requirements" for "offering of service." So, for example, the Commission may find it lawful for a programmer to discriminate between MVPDs based on the MVPDs' penetration commitments or based on the willingness of one MVPD to take the full compliment of a programmer's services while another desires to carry only a single channel. The Commission must evaluate such differences in treatment of different MVPDs on a case-by-case basis. The Commission will be able to determine if such differences are lawful by scrutinizing the practices of the programmer with respect to all MVPDs, to determine if it makes the same options available to all MVPDs and if all MVPDs are treated alike under such options.

based on costs or the other legitimate factors enumerated in the statute, and if it cannot or chooses not to do so, a violation must be found.[30] This allocation of burdens is plainly required by the blanket statutory prohibition against discrimination. In addition, as noted above, the aggrieved MVPD should not be required to produce evidence concerning the justification for the discriminatory treatment when any relevant information concerning such a justification would be within the sole possession of the programmer. The Commission must therefore place the burden of proof as to possible justifications where it properly lies -- with the programmer.[31]

Finally, the statute does not address whether discriminatory arrangements in existence prior to the effective date of the Commission's rules should be required to be brought into compliance. However, as the Commission notes, if it applies its new rules under Section 628(c)(2)(B) prospectively only, parties to existing programming contracts will be denied the benefit of this section for the duration of those contracts. See NPRM at ¶ 27. The only effective approach, therefore, is to permit parties to existing contracts to bring complaints under Section 628(c)(2)(B), and in such event give programmers a reasonable period of time, such as six months, in which to bring preexisting contracts into compliance with the new law. DirecTv believes that Congress intended this result because, in Section 628(h)(1), it exempted a limited class of

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30/ The defenses listed in Sections 628(c)(2)(B)(i)-(iv) should be strictly construed by the Commission. For example, subsection (B)(i) provides that programmers may impose "reasonable requirements" on MVPDs who seek to purchase their programming, "for creditworthiness, offering of service, and financial stability and standards regarding character and technical quality." The Commission should require that, to establish this defense, the programmer should show the "reasonableness" of the requirement by showing that the programmer imposes the same requirement in a uniform manner on all MVPDs, including affiliated cable operators. In addition, the Commission should consider whether the requirement can reasonably be satisfied. For example, if the programmer states that a MVPD lacks creditworthiness, the MVPD should be able to rebut this defense by offering evidence of widely accepted indicia of creditworthiness such as a bank letter of credit.

31/ The Commission asks whether price differences should be permitted if it were shown that non-vertically integrated programmers also employ such practices. NPRM at ¶ 25. The answer to this question must be no, because Congress has already found that non-vertically integrated programmers also engage in anti-competitive pricing due to pressure from cable systems with extraordinary market power. See note 8, supra.

preexisting contracts from the prohibitions of Section 628 -- impliedly, it determined that other preexisting contracts would not be exempt. Moreover, Congress clearly intended that as preexisting contracts are renewed or extended, they must be brought into compliance with all the provisions of Section 628. See Section 628(h)(2). It is entirely consistent with Congressional intent, therefore, for the Commission to require that preexisting contracts which are the subject of a complaint by one of the parties thereto be brought into compliance within six months of the effective date of the new rules.[32] In addition, if preexisting contracts are modified or amended, or renewed or extended, before that date, they should also be required to be brought into compliance.

3. *Restrictions on Exclusive Contracts Under Sections 628(c)(2)(C) and 628(c)(2)(D).*

The final two provisions of Section 628(c)(2) deal with and generally prohibit exclusive contracts for the carriage of cable programming between a cable operator and any satellite cable programming vendor in which any cable operator has an attributable interest. Section 628(c)(2)(C)) deals with the provision of programming to uncabled areas and Section 628(c)(2)(D) deals with the provision of programming to cabled areas. Section 628(c)(2)(C) also prohibits "other practices, understandings, arrangements and activities" which have the same effect. The prohibition against exclusive contracts for uncabled areas is absolute. Exclusive contracts for cabled areas are also strictly prohibited unless the Commission determines that such contract is in the public interest, based on the criteria set forth in Section 628(c)(4). There is a 10-year sunset provision for Section 628(c)(2)(D) under Section 628(c)(5).

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[32] If a MVPD that is not a party to a preexisting contract files a complaint alleging discrimination as compared to a party to such preexisting contract, the preexisting contract would not have to be altered as long as the same terms and conditions were made available to the complainant.

The general policy underlying these provisions is that an exclusive contract for cable programming is presumptively unlawful if the programming vendor is vertically integrated with any cable operator, regardless of whether the contract is with an affiliated cable operator or with an unaffiliated cable operator. The Commission correctly points out that such contracts are per se violations of the statute if they prevent an MVPD from providing service to uncabled areas. NPRM at ¶28.[33] The Commission has discretion to permit exclusive contracts only for service to cabled areas, and only if it makes the required public interest finding under Section 628(c)(4). That finding must take into account each of the considerations listed in Section 628(c)(4), including the effect of such contracts on the development of competition, both at the local level and at the national level, and from video distribution technologies other than cable (such as DBS), according to Sections 628(c)(4)(A) and (B).[34] The Commission should take a "hard look" at these contracts because of the statutory presumption that exclusive contracts are harmful to the development of competition; the Commission should also bear in mind that the prohibition will sunset in ten years unless the Commission determines that it is still necessary to preserve competition and diversity in the video distribution market. Therefore, for the period in which the statutory prohibition is in place, enforcement should be strict so that competition and diversity may develop as Congress intended. If the Commission does approve any exclusive

[33] The Commission notes that such a contract is prohibited if the contract has the effect of preventing another MVPD from obtaining the same programming, and asks whether an "analysis of anticompetitive harm" is required under the statute. NPRM at ¶34. Exclusive contracts by their very nature preclude other MVPDs from obtaining similar programming distribution rights; Congress has determined that in a market where competition is virtually absent (such as the present video programming distribution market), such an effect is contrary to the public interest, which favors the development of competition for the reasons discussed in Section I., above. Therefore, no further analysis is required of the Commission. See, e.g., Senate Report at 28 ("The Committee believes that exclusivity can be a legitimate business strategy where there is effective competition. Where there is no effective competition, however, exclusive arrangements may tend to establish a barrier to entry and inhibit the development of competition in the market.").

[34] In contrast, under Section 628(c)(2)(C), the Commission has no discretion to make such an inquiry; the anti-competitive effect of such contracts is statutorily presumed.

contracts under Section 628(c)(4), the Commission should ensure that such contracts are narrowly circumscribed. However, DirecTv strongly opposes any blanket presumptions about contracts that could be permitted under Section 628(c)(4). See NPRM at ¶36.[35]

The "area" served (or not served) by a cable operator under these sections should be wherever the cable system actually "passes" homes -- that is, where cable service can be connected by a simple "drop" of a non-amplified signal for a standard connection fee.[36] Thus, if a home is not actually passed by a cable system, Section 628(c)(2)(C) applies.

Because of the public interest determination requirement of Section 628(c)(4), the Commission must require vertically integrated programmers to file all exclusive programming contracts for service to cabled areas with the Commission, and seek the Commission's approval before such contracts take effect. With respect to programming contracts for service to uncabled areas, if a complaint is filed under Section 628(c)(2)(C) alleging that a MVPD cannot obtain programming rights from a particular programming vendor; the programming vendor should be required to submit all of its contracts for the affected area for FCC review to determine if any exclusive contracts exist.

Refusal of a vertically integrated programmer to sell programming to a MVPD should be sufficient cause for a complaint under Section 628(c)(2)(C) or (D). Thereupon the Commission should place the burden of proof on the programmer to establish that it has not given any exclusive contracts to cable operators or that its exclusive contract for a cabled area is

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35/ For example, the Commission proposes a presumptive public interest finding for "new program services" contracts of two years in duration or less. NPRM at ¶36. Congress has already determined that, although exclusive contracts may have some potential benefits in some circumstances, their detrimental impact on competition outweighs any such benefits, at least until competition has the opportunity to take a foothold. That is why the statute requires the Commission to make a public interest finding with respect to any contract that it exempts under Section 628(c)(2)(D). Such a blanket presumption as the Commission proposes would be an abuse of discretion under the statute.

36/ See Conference Report at 93.

justified under Section 628(c)(4). If a contract is not written, the programmer should be required to reduce its terms to writing and certify as to the accuracy of the writing. See NPRM at ¶33. There is simply no way for a MVPD to know the contents of a programmer's contracts with cable operators unless they are submitted to the Commission for review.[37]

C. Procedures for Enforcement Under Section 628 Should Be Simple, Expedient and Fair.

Section 628(d) provides that any aggrieved MVPD may commence an "adjudicatory proceeding" at the Commission to enforce the provisions of Section 628 and the rules adopted by the Commission thereunder. Section 628(e) empowers the Commission to order "appropriate remedies," and Section 628(f) provides that the Commission should review complaints under Section 628 on an "expedited" basis.

DirecTv supports the Commission's view that it is preferable to resolve disputes under Section 628 without a hearing, and believes that most aggrieved MVPDs will not seek a hearing because of their interest in obtaining expedited relief from the Commission. See NPRM at ¶35. However, DirecTv also agrees that where there are "substantial and material issues of fact that cannot be resolved by the staff or through stipulation by the parties," NPRM at ¶39, a trail-type hearing may be the only way to resolve these issues.[38]

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[37] Section 628(f)(2) of the Act contemplates that the Commission may collect whatever data is necessary to carry out Section 628, including "copies of all contracts and documents reflecting arrangements and understandings alleged to violate this section." As discussed above, the clear intent of Congress was to facilitate access to programming by competitors to cable, and competitors would be precluded from any remedy under the statute if they were required to prove the contents of agreements to which they had no access. Therefore, it is proper for the Commission to place the burden on the vertically integrated programmers to produce the evidence that is relevant to a Section 628(c)(2)(C) or (D) analysis.

[38] Even though DirecTv believes that most aggrieved MVPDs will prefer the expedited nature of a "paper hearing" process of the type proposed by the Commission, it is possible that some MVPDs will seek a trial-type hearing. See 1992 Cable Act § 628(d) ("Any [MVPD] aggrieved by conduct that it alleges constitutes a violation of subsection (b), or the regulations of the Commission under subsection (c), may commence an adjudicatory proceeding at the Commission"). However, DirecTv believes it unlikely that a trial-type hearing is required under

The Commission has proposed a complaint process under Section 628 whereby complaints would be accompanied by affidavits as to factual matters relevant to a prima facie case, and responses would be accompanied by materials supporting the defenses raised. NPRM at ¶¶39-40. DirecTv supports this "paper hearing" approach provided that the Commission appropriately defines the elements of a prima facie case as described above, and properly places the burden of producing evidence on the party in possession of the relevant facts -- in most cases this will be the programmer. If the programmer fails to produce evidence to rebut the claim or to establish one of the statutory defenses, the Commission's inquiry should be at an end and the programmer should be found in violation of the statute. If the programmer does produce evidence to counter the claim, the Commission staff should allow discovery appropriate to the defense raised. For example, in a claim of discrimination, if the defense is that the programmer's costs justify disparate treatment of the complainant and another MVPD, the complainant should be allowed discovery of the programmer's cost data. In view of the statutory presumption that discrimination in any form is unlawful, it is appropriate for the Commission to authorize discovery that corresponds in nature and breadth to the defense asserted by the programmer.[39] In

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this provision. The definition of "adjudication" under the Administrative Procedure Act ("APA") is vague, and basically encompasses every agency process for the final disposition of a matter other than a rule making. See 5 U.S.C. §§551(6), 551(7). The requirements for an "adjudication" by an administrative agency are set forth in Sections 556 and 557 of the APA, and apply to "every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." 5 U.S.C. §554 (emphasis added). In the rulemaking context, the Supreme Court has held that a trial-type hearing is not required unless the governing statute provides for rules to be made "on the record after opportunity for an agency hearing." United States v. Allegheny-Ludlum Steel, 406 U.S. 742 (1972). See also United States v. Florida East Coast Ry., 410 U.S. 224, 234 (1973) (the words "after hearing" are not sufficient to require a trial-type hearing; the statute must also require that the rule be made "on the record"). It is likely that the same analysis would be applied to the 1992 Cable Act's provision for an "adjudicatory proceeding". See, e.g., Gallagher & Ascher Co. v. Simon, 687 F.2d 1067 (7th Cir. 1982) (where the governing statute does not prescribe a trial-type hearing, the formal adjudicatory procedures under Sections 556 and 557 of the APA are not mandated).

[39] Because of the importance of discovery in Section 628 complaints, this procedure should be modeled on the Commission's complaint process under Section 315(b) of the Communications Act, where a complainant is given full access to a broadcaster's programming sales records for a

addition, an opportunity for replies should be provided. The aggrieved MVPD will be unable to make a detailed case until after the programmer or cable operator submits evidence in response to the complaint, due to the unique nature of Section 628 complaints, as discussed above (i.e., the vertically integrated programmer or cable operator has exclusive access to contractual and cost evidence relevant to its activities in the distribution market).

DirecTv supports the Commission's proposal to expedite the discovery and resolution process. NPRM at ¶¶46, 48. The purpose of Section 628 is to ensure that competing MVPDs obtain access to programming; therefore, the Commission's goal should be to resolve complaints quickly and order an appropriate remedy. While the imposition of forfeitures should be an option for egregious violations, the ultimate remedy will always be to ensure that the programming is available to MVPDs on non-discriminatory terms. Therefore, the most common remedy for a violation of Section 628 will be to order a programmer to provide programming to the complainant on the same terms and conditions as other MVPDs enjoy.

Finally, the Commission should tread lightly in imposing forfeitures for "frivolous complaints" under Section 628 so as not to deter legitimate complaints. Whatever standard the Commission adopts for determining whether a complaint is "frivolous" within the meaning of Section 628(f)(3), it should take into account the fact that, for the reasons discussed above, most complaints will be based on a simple affidavit from a MVPD attesting to its inability to obtain programming or its belief that it has been discriminated against by a programmer, and that these bare facts are all that the statute requires to support a prima facie case. As previously discussed, it will not be known whether a complaint is well-founded until the programmer or its cable operator affiliate produces the relevant contracts and other pertinent factual material. A

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relevant period to determine whether the complainant has been denied the "lowest unit charge" for time purchased in that period, and Section 208 of the Communications Act, where a complainant is permitted pre-designation discovery to determine whether it has been the victim of discriminatory charges by a common carrier. See NPRM at ¶39 and cases cited therein.

complaint should not be found to be "frivolous" merely because the complainant does not prevail, particularly if the basis of the Commission's decision is evidence that the complainant had no way of knowing until it was produced by the programmer in the complaint proceeding.

III. CONCLUSION

Because of the unequivocal statutory directive that the Commission promote services that are competitive to existing cable services, and service providers that compete with the MSOs, the Commission's reading of the specific statutory prohibitions of Section 628 should be as comprehensive as possible, taking into account all behavior that hinders competitors from obtaining programming, not just the particular acts or practices that are explicitly required to be prohibited under Section 628(c). DirecTv firmly believes that adequate rigor in implementing this statute now is crucial. If the Commission is vigilant at the outset, a competitive market for video programming distribution services surely will develop. Then, and only then, will the Commission's regulatory role be minimized, as Congress intended. The Commission has been charged with playing a crucial role in the development of competition in the video market. DirecTv urges the Commission to fulfill that obligation as outlined herein.

Respectfully submitted,

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January 25, 1993